(2)

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-1521

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF STATE,
BUREAU OF CONSULAR AFFAIRS ET AL.,

Petitioners,

v.

LEGAL ASSISTANCE FOR VIETNAMESE
ASYLUM SEEKERS, INC. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT B. JOBE
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

WILLIAM R. STEIN
Counsel of Record
DANIEL WOLF
M. KATHLEEN O'CONNOR
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the Department of State violated 8 U.S.C. § 1152(a), which prohibits discrimination on the basis of nationality in the "issuance" of immigrant visas, by adopting a policy requiring Vietnamese nationals residing in Hong Kong to return to the Socialist Republic of Vietnam to have their visas processed and issued, while not imposing a comparable requirement on nationals of other countries.

2. Whether a Department of State policy that violates 8 U.S.C. § 1152(a) because it discriminates against persons in the issuance of an immigrant visa on account of their nationality is subject to judicial review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

STATUTES AND REGULATIONS:

OTHER AUTHORITIES:

Respondents Legal Assistance for Vietnamese Asylum-Seekers, Em Van Vo and Truc Hoa Thi Vo, respectfully submit this brief in opposition to the petition of the Department of State, Bureau of Consular Affairs et al. ("the Department") for a writ of certiorari.

STATEMENT

Respondent Em Van Vo ("Mr. Vo") is a U.S. citizen and the father of respondent Truc Hoa Thi Vo ("Ms. Vo"). (J.A. 0198-99.)[1] On June 24, 1979, Mr. Vo was able to escape from Vietnam by boat. His entire family, however, remained behind. (J.A. 0199.) Eleven years later, in July 1990, Ms. Vo fled to Hong Kong, where she has been detained ever since with her husband and two young children. (J.A. 0199-200.)

In April 1993, the Immigration and Naturalization Service ("INS") approved the immigrant visa ("IV") petition that Mr. Vo had filed on his daughter's behalf so he could reunite with her in the United States. Later that month, Mr. Vo was informed that his daughter would be interviewed by the U.S. Consulate in Hong Kong and if found eligible for the visa, "action will be taken to arrange for [her] departure from Hong Kong." (J.A. 0200-01, 0207-08.) On December 15, 1993, however, the U.S. Consulate, pursuant to a decision the Department had made eight months

---

1 References to "J.A.___" are to the page(s) at which the material may be found in the Joint Appendix filed with the court below. In its petition, the Department cites numerous materials from the record in Lisa Le v. United States Department of State, Bureau of Consular Affairs, No. 95-5425 (D.C. Cir.), which are not part of the record in this case. Respondents suggest that all such citations to the record in the Lisa Le case are inappropriate. Nonetheless, in the event this Court believes that the record in Lisa Le can properly be considered with respect to the petition in this case, respondents have referred to such materials in this opposition. References to "L.A.___" are to the page(s) at which the material may be found in the Department's Appendix to an unauthorized brief it filed in the Lisa Le case (which the Department inaccurately characterizes as a "joint" appendix).

earlier in April, informed Mr. Vo that the Department had reversed its policy and would not process his daughter's IV application unless and until she returned to the Socialist Republic of Vietnam ("Vietnam"). (J.A. 0201, 0210.)

On February 25, 1994, Mr. Vo and his daughter brought this action in response to the Department's April 1993 decision to cease issuing immigrant visas in Hong Kong to Vietnamese nationals who, like Ms. Vo, reside in detention centers in Hong Kong and who, like Ms. Vo, have been authorized to immigrate to the United States by the INS. Respondents seek declaratory and injunctive relief on behalf of these Vietnamese nationals, and on behalf of the U.S. citizens and permanent residents who sponsored their IV petitions, to vindicate their right to non-discriminatory treatment in the issuance of immigrant visas under a congressionally mandated family reunification program.

While the Department seeks to portray this case as one of judicial interference with the Department's visa processing policies, in reality, this case involves nothing more than a straightforward issue of statutory construction under Section 202(a)(1) of the Immigration and Nationality Act ("INA"), which provides that "[n]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a). The D.C. Circuit made the unremarkable finding that when a person is forced to leave his country of residence to have his visa processed and issued because of his race or nationality, that person has been discriminated against "in the issuance of an immigrant visa."

Although this conclusion is dictated by the plain language of Section 202(a)(1), the Department asks this Court to rewrite that statutory provision because it does not like certain potential policy consequences it alleges might flow from the D.C. Circuit's decision to enforce the statute as written. We show below why the D.C. Circuit's decision has no significant impact on the Department's visa processing function, and why the consequences envisioned by the Department are speculative and wildly overblown. Moreover, if the Department has concerns about the effects of the unambiguous statutory provisions, the appropriate forum in which to seek review of congressional policy choices is

the Congress and not this Court. Acknowledging this fact, and implicitly acknowledging the correctness of the decision below, the Department has asked the Congress to amend Section 202(a)(1) of the INA to allow the Department to discriminate in the ways it says it must be able to discriminate. This Court, for its part, should leave that policy choice to Congress and reject the Department's invitation to pass upon the desirability of its proposed amendment to Section 202(a)(1).

1. Detention and screening of the boat people.

Since April 1975 when North Vietnamese forces captured Saigon, large numbers of refugees have escaped political oppression and economic privation in Vietnam by taking a dangerous journey across the open sea in rickety boats to Southeast Asia and Hong Kong. (J.A. 0116-18; J.A. 0186-87.) For nine years, from June 1979 until June 1988, the treatment of these Vietnamese "boat people" in Hong Kong was guided by an informal arrangement under which Hong Kong and other nations in the region committed themselves to granting temporary refuge ("first asylum") to Vietnamese boat people in exchange for a commitment from the United States and other western countries to resettle them. As part of this agreement, the Hong Kong Government ("HKG") accorded the Vietnamese boat people presumptive refugee status. (J.A. 0117-18.)

This relatively benign treatment of the boat people changed dramatically in 1987-88, when a new wave of refugees fled Vietnam. The HKG responded to the increase in new arrivals by announcing that as of June 16, 1988, it was revoking the presumptive refugee status of Vietnamese boat people and that all new arrivals would be detained and screened by local immigration authorities to determine on a case by case basis whether they qualified for refugee status. (J.A. 0118-19.) One year later, in June 1989, the screening program was memorialized in an informal agreement of the participating states (including the United States) known as the Comprehensive Plan of Action ("CPA").

Beginning on June 16, 1988, therefore, the HKG has regarded newly arriving boat people as illegal aliens and has placed them in

large prison-like detention centers surrounded by high chain link fences topped with rolls of barbed concertina wire. (J.A. 0118-19, 0121-22.) As human rights organizations have conclusively documented, these squalid detention centers are characterized by intense overcrowding, complete lack of privacy, unremitting boredom, extreme noise and heat, and the constant threat of rape, robbery, extortion, and other forms of physical violence. (J.A. 0121-22, 0149-53, 0156-59, 0181-85.)

2. U.S. refugee and immigration policies toward the boat people prior to April 1993.

Since at least 1979, the United States has permitted Vietnamese boat people to enter the United States on either of two tracks: as refugees under the criteria for political refugees later codified in the Refugee Act of 1980 or as beneficiaries of immigrant visas under the criteria set forth in the INA, 8 U.S.C. §§ 1151-1156. (J.A. 0116-18; J.A. 0089-90.) This case relates only to the immigrant visa track.

The immigrant visa option is available to boat people who are sponsored to immigrate to the United States by close relatives who are citizens of or permanent resident aliens in the United States. In order to obtain an immigrant visa, eligible Vietnamese boat people and their U.S. sponsors must complete several steps. First, the sponsoring U.S. citizen or lawful permanent resident (known as the "petitioner") must file a petition (Form I-130) with the INS, which may either approve or deny the petition. 8 C.F.R. § 204.1(a). Second, if the INS approves the petition, the Vietnamese visa applicant -- the "beneficiary" of the petition -- must complete and submit to the State Department an application for an immigrant visa (Packet Three and Form OF-230). 22 C.F.R. § 42.63(a). Third, the beneficiary must provide various documents to a U.S. consulate and must appear at the consulate for final processing of the visa application, including an interview before a consular officer, who must determine whether to grant the visa. 22 C.F.R. § 42.62(a).

For nearly 14 years, from June 1979 until April 1993, the Department, in accordance with the INA, processed IV applications for Vietnamese boat people in Hong Kong at the

Consulate in that jurisdiction, whether or not their status was "illegal" (i.e., screened out or not yet screened) under HKG immigration procedures. (J.A. 0118; J.A. 0089-90.) Such processing in Hong Kong was consistent with the controlling regulations that were in effect at the time, which required that the State Department conduct an applicant's IV interview "in the consular district in which the alien resides" or in which he is "physically present."[2] 22 C.F.R. § 42.61 (1993). It is not disputed that detained boat people are "residents" of Hong Kong within the meaning of either the former or the recently amended regulations.[3]

The implementation of the screening and detention policy in Hong Kong in June 1988 and the adoption of the CPA in June 1989 did not alter the Department's practice. The Department continued to process IV applicants at the U.S. Consulate in Hong Kong, regardless of whether or not they had been "screened-in" as refugees by the HKG. (J.A. 0118, 0212-13.) Indeed, in a cable dated December 14, 1990, the Department explained that to require the beneficiaries of current IV petitions who had been screened-out or who had not been screened-in to return to Vietnam for visa processing "strikes the Department as procedural overkill and not at all necessary to preserve the integrity of the CPA." (J.A. 0102-05 (emphasis added).)

---

2 Under the INA, a person's "residence" is defined as "the place of general abode," which, in turn, is defined as a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). See also note 5 infra.

3 In response to this litigation, the Department amended its regulations on September 6, 1994 to give the Department discretion to deny immigrant visa beneficiaries the right to have their visa applications processed in the place in which they reside or are physically present. 59 Fed. Reg. 39,555 (1994). See 22 C.F.R. § 42.61(a) (1996).

3. U.S. refugee and immigration policies toward the boat people subsequent to April 1993.

In April 1993, the Department abruptly, and without notice to IV petitioners or beneficiaries, reversed its practice of processing IV applications for Vietnamese boat people at the U.S. Consulate in Hong Kong. (J.A. 0139-40; J.A. 0092-93.) Under the new practice, the Department refused to process the current IVs of any Vietnamese boat person who was illegally in Hong Kong, i.e., who had not been "screened-in" by the HKG as a political refugee. (J.A. 0125.) In a letter dated September 24, 1993, the U.S. Consulate described its new policy as follows:

> We have received clear instructions from the Department of State in Washington, D.C., that we are only authorized to process the immigrant visa cases of persons recognized [by HKG] as refugees. We may not process the immigrant visa request of anyone awaiting a screening decision. We also may not process the case of anyone screened-out as a refugee. This stipulation holds regardless of whether the person in question is a beneficiary of a current U.S. visa petition.

(J.A. 0130.)

In approximately December 1993, eight months after the change in policy, the U.S. Consulate started systematically notifying current IV beneficiaries that they would not be processed in Hong Kong. (J.A. 0195.) The standard letter stated as follows:

> The U.S. government supports the [CPA] . . . Under the CPA, those not recognized as refugees . . . must return to Vietnam to pursue resettlement in a third country. You have not been granted refugee status. Since you have been screened out, you must therefore return to Vietnam.

(J.A. 0131-35.)

The Department's requirement that current IV beneficiaries return to the country from which they fled in order to have their visa applications processed left those beneficiaries without any

viable option. An immigrant visa beneficiary who returns to Vietnam to have his or her application processed by a U.S. Consulate there will have that effort hampered by difficult, corrupt, costly and time consuming bureaucratic obstacles. (J.A. 0103, 0127-28, 0143-49.) Indeed, the district court in the Lisa Le case found that "substantial doubt" exists as to whether an applicant who returns to Vietnam will ever be able to "secure an exit visa" from the Hanoi regime. Vo Van Chau v. United States Dep't of State, 891 F. Supp. 650, 656 (D.D.C. 1995), appeal dismissed as moot, Order, No. 95-5205 (D.C. Cir. Oct. 19, 1995). (See also J.A. 0147, 0253, 0303-04, 0305-09.) Moreover, even if they could have their visas processed in Vietnam without encountering any but the normal obstacles, the full process takes at least one year to complete. (J.A. 0149; L.A. 343.) During this time, the returning applicants -- who will have cut all of their ties with Vietnam before they left and who may have no family to return to -- will endure emotional trauma, discrimination and severe economic hardship, even if they are not "refugees" within the meaning of the 1951 Convention Relating to the Status of Refugees. (J.A. 0126, 0143-49; L.A. 460-61; Third Supplemental Declaration of Mark L. Zuckerman, sworn to August 11, 1995 (in the record in Lisa Le and not included in the Department's "joint appendix") at ¶¶ 2-5.)

4. The initial proceedings in the district court.

On February 25, 1994, respondents Em Van Vo and Truc Hoa Thi Vo, together with LAVAS and two other named plaintiffs (Thua Van Le ("Mr. Le") and Thua Hoa Thi Dang ("Mrs. Dang")), on behalf of themselves and all other persons similarly situated, brought this action against the Department of State, challenging its April 1993 decision to cease IV processing. The complaint alleged that this decision was in violation of the INA and the regulations promulgated thereunder, the Administrative Procedure Act ("APA"), and the Constitution of the United States. (J.A. 0325-42.)

In order to prevent irreparable injury in the form of forcible repatriation, continued detention under deplorable conditions, and prolonged separation from family members, respondents filed,

together with their complaint, motions for a temporary restraining order and a preliminary injunction. On March 2, 1994, the district court refused to issue a TRO requiring the State Department to take action to prevent the repatriation to Vietnam of several members of the putative class who were due to be forcibly repatriated on March 8. (Pet. at 21a.)

On March 3, respondents appealed this order on the ground that it in effect constituted denial of a preliminary injunction, and filed a motion for emergency relief in the court of appeals. Finding that respondents would suffer irreparable injury if they were repatriated to Vietnam, the court of appeals issued an order on March 6 granting respondents' motion and directing the State Department "to take all necessary and proper action to ensure that [the putative class members] are not repatriated." (Pet. at 23a.) As a result of this order, the Department communicated with the HKG, which complied with the Department's request that the class members be removed from the March 8 forced repatriation flight. (J.A. 0022.)

Following a hearing that consolidated respondents' application for a preliminary injunction with the trial on the merits,[4] the district court issued a final order on April 28, 1994, granting the State Department's motion for summary judgment and denying respondents' cross motion for summary judgment. (Pet. at 28a.)

The district court rejected respondents' argument that the applicable regulations required the Department to process their visa applications in Hong Kong. Despite the plain language and the Department's own authoritative interpretation, the district court held that the regulation made the decision whether to process respondents' visa applications a "policy choice" that is "entitled to deference." (Pet. at 27a.) In a single sentence containing no

---

4 No evidence was heard at the hearing, which consisted only of oral argument. Earlier, the district court had prohibited respondents from taking limited documentary discovery of the Department's cable traffic relevant to the decision to refuse IV processing, and from deposing pursuant to Fed. R. Civ. P. 30(a)(2)(C) a key witness while she was temporarily in the United States. (J.A. 0013.)

analysis, the district court also found "meritless" respondents' arguments that the Department's refusal to process was unlawful because it violated 8 U.S.C. § 1152(a) of the INA, the Constitution, the Department's own long-standing practice and the notice and comment requirements of the APA. (Id.)

5. The decision of the court of appeals.

On February 3, 1995, the D.C. Circuit issued its decision in this case, holding that the Department's April 1993 policy was discriminatory because it drew an explicit distinction between Vietnamese nationals and the nationals of other states: the Department had instructed the Consulate not to process the "immigrant visa petitions of Vietnamese nationals residing illegally in Hong Kong." (Pet. at 12a.) The court rejected the Department's suggestion that the line drawn was a "permissible line between legal and illegal immigrants," noting that "[t]he Department has never contended . . . that this change was made as to any other nationals than Vietnamese nationals, nor that illegally present nationals of other countries would be treated the same as illegally present Vietnamese nationals." (Pet. at 12a.)[5] The court of appeals held that such discrimination violated section 1152 of the INA, which "unambiguously direct[s] that no nationality-based discrimination shall occur." (Pet. at 11a.) Rejecting the Department's suggestion that it retains discretion under Section 1152(a) to discriminate on the basis of nationality so long as its policies are rationally related to U.S. foreign policy interests, the court stated:

---

5 This is hardly surprising since the Department's Foreign Affairs Manual ("FAM") indicates that it is the Department's policy not to make such distinctions between legal and illegal status of aliens from other nations who apply for IVs in Hong Kong or elsewhere. See FAM § 42.61, N.1.2 ("the fact that an alien does/did not have, or intend to have, the status of a lawful permanent resident or any other legal status" in the country of his principal, actual dwelling "is not relevant").

> Congress could hardly have chosen more explicit language. While we need not decide in the case before us whether the State Department could never justify an exception under the provision, such a justification, if possible at all, must be most compelling -- perhaps a national emergency. We cannot rewrite a statutory provision which by its terms provides no exceptions or qualifications simply on a preferred "rational basis."

(Pet. at 9a.)

6. Subsequent proceedings.

After the court of appeals issued its decision, the Department claimed for the first time in a petition for rehearing that 8 U.S.C. § 1152(a) applies only to the decision of a consular officer whether to grant or deny an immigrant visa, and does not bar the Department from discriminating on account of race, nationality or the other enumerated bases in determining where visa applications will be processed ("consular venue"). The Department also argued for the first time that the case was moot because it had voluntarily processed or agreed to process the claims of the named plaintiffs and because a class action had not been certified.[6]

---

6 The basis for the Department mootness argument was its eleventh hour decision made on February 25, 1994, the day respondents filed their complaint, to resume "normal" visa processing of the IV petitions of Vietnamese asylum seekers in Hong Kong. (J.A. 0044-45.) Following this decision, the Department interviewed Mrs. Dang and Ms. Vo at the U.S. Consulate in Hong Kong on July 21 and November 30, 1994, respectively. Mrs. Dang was determined to be eligible for an immigrant visa, thus mooting her claim and that of her husband Mr. Le. (Pet. at 42a.) Ms. Vo was determined to be preliminarily ineligible for a visa, but was informed that she had a right under the INA to resubmit her application. (Pet. at 42a-43a.) On December 1, 1994 the Department returned to its former policy of refusing to process IV applications of Vietnamese asylum-seekers who had not reported themselves "documentarily qualified" by that date. (Pet. at 46a.) The Department has asserted that this new policy

[Footnote Continued On Next Page]

On May 9, 1995, the court of appeals remanded the record to the district court for the purpose of deciding the issue of mootness. (Pet. at 30a.) On September 11, 1995, the district court held that the Department's voluntary conduct had mooted the case. (Pet. at 37a-38a.) On February 2, 1996, the court of appeals reversed, holding that the case was not moot as to respondents Em Van Vo and Truc Hoa Thi Vo, and denied the petition for rehearing. (Pet. at 40a.) On February 12, 1996, the full court denied the Department's suggestion for rehearing in banc. (Pet. at 51a.) On February 21, 1996, the court of appeals stayed issuance of the mandate for thirty days pending the filing of a petition for a writ of certiorari. (Pet. at 53a.) On March 21, the Department filed its petition in this Court.

REASONS FOR NOT HOLDING THE PETITION

As the Department points out, the issues that are the subject of its petition are currently again before the D.C. Circuit in Lisa Le v. United States Department of State, Bureau of Consular Affairs, Nos. 95-5425 and 96-5058 (D.C. Cir.), which is to be heard initially in banc and is scheduled for oral argument on September 19, 1996.[7] Because "the en banc court of appeals is currently considering the same issues," the Department asks this Court to "hold this petition until the court of appeals renders its decision." (Pet. at 27.) The Department gives one reason for requesting this hold: it wishes to prevent the mandate of the court of appeals from issuing in this case and, thereby, to prevent this case "from returning to the district court for inappropriate class certification

---

[Footnote Continued From Previous Page]

> does not apply to Ms. Vo and that it is willing to process her application in Hong Kong.

7 The Department made the same ploy in the court of appeals, which denied its motion to extend the stay of the mandate in this case pending the disposition of the in banc proceedings in Lisa Le. (Pet. at 54a-55a.)

proceedings." (Id.) This Court should reject the Department's request to hold the petition.

1. Under Fed. R. App. P. 40(b), a stay of the mandate of the judgment of the court of appeals cannot exceed 30 days unless the period is extended for cause shown or the party who has obtained the stay files a petition for a writ of certiorari. The rationale for this rule is that "a petitioner who wishes to delay the enforcement of the order of the lower court may reasonably be expected to expedite the litigation by not taking the full time otherwise allowable by law." Robert L. Stern, Appellate Practice in the United States (2d ed. 1989).

In suggesting that this Court hold its petition for certiorari pending resolution of the in banc proceedings in Lisa Le, the Department asks this Court to assist it in its efforts to accomplish precisely what Fed. R. App. P. 40(b) was intended to prevent: delay in the enforcement of the order of a lower court. This is not an appropriate use of a petition for a writ of certiorari. The purpose of such a petition is to obtain review of federal questions of imperative public importance, not to gain tactical advantage over the other side by delaying the enforcement of the decisions of the courts below.

2. The Department's reason for asking this Court to hold the petition for certiorari makes no sense. If the petition is denied -- and we believe it should be -- the district court and the court of appeals are fully capable of determining what is "inappropriate" in this case in the light of the procedural posture of the Lisa Le case.[8] There is no justification for this Court to withhold decision on the petition as a means of controlling possible future procedural rulings by the courts below.

Moreover, deferral by this Court of its decision on the Department's petition cannot prevent possible class certification

---

8 On April 18, 1996, the court of appeals in Lisa Le granted the Department's motion for a stay of the district court's order in that case pending disposition of the in banc proceedings. Order, Nos. 95-5425 and 96-5058 (D.C. Cir. Apr. 18, 1996).

which, despite the Department's suggestion, would hardly be "inappropriate." See pp. 14-16 infra. Any of the putative class members in this case is free at any time to file a separate action and immediately move for class certification therein. Accordingly, further stay of the mandate cannot achieve the result the Department desires.

3. On the other hand, were this Court inclined to grant the petition, fairness to the respondents and the putative class members dictates that it do so now, rather than waiting until the resolution of the in banc proceedings in Lisa Le. As we explain below, the Department has done everything in its power to deny respondents and the putative class members the ability to obtain timely relief both in this case and in the Lisa Le case. The Department now seeks to drag out these proceedings even further by inviting this Court to hold its petition pending the disposition of the in banc proceedings in Lisa Le.

If the Court were to wait until Lisa Le, the prospect of substantive review by this Court would be illusory. Oral argument is not scheduled to take place in the Lisa Le case until September 19, 1996. It seems unlikely that the court of appeals can rule in Lisa Le before December 1996 or January 1997 at the earliest. As the Court must be aware, however, on July 1, 1997 Hong Kong reverts to the rule of Communist China, which has "demanded that the camps there be empty when [it] takes control." "New Boat People Exodus: Back to Vietnam," N.Y. Times, Apr. 17, 1996, at A12.

If the D.C. Circuit in Lisa Le were to overrule the LAVAS decision, respondents and the putative class members would have insufficient time to obtain review by this Court before they are forcibly repatriated to Vietnam, and thus would be forever denied the relief they seek. On the other hand, were the D.C. Circuit in Lisa Le to uphold LAVAS, it would be too late for this Court to decide the case or even to schedule argument before July 1, 1997.[9]

---

9 In the latter circumstance, either (1) the Department will obtain a stay of the mandate, in which case respondents as a practical matter will

[Footnote Continued On Next Page]

Such a result would be extremely unfair to respondents and the class they seek to represent. Respondents filed this action as a class action for the purpose of vindicating their right and the right of all persons similarly situated to timely non-discriminatory processing of their visa applications in Hong Kong. Respondent Em Van Vo sued so that he and the other American citizens and permanent residents he is trying to represent could promptly be reunited with their family members, rather than having to wait while those family members return to Vietnam where at a minimum they would have to wait one year or longer to have their visas processed, and where there is a risk they might never be given an exit visa. In the meantime, Mr. Vo's daughter, respondent Truc Hoa Thi Vo, and the detained Vietnamese nationals she is trying to represent, continue to languish in detention camps under horrible conditions, separated from their loved ones in the United States.

4. Deferring decision on the petition would reward the Department's inappropriate procedural maneuvering in the courts below. Respondents have been seeking class certification for more than two years since the day they filed this action on February 25, 1994. The district court, however, never ruled on respondents' class certification motion because, at the Department's insistence, it granted the Department's motion for summary judgment on April 28, 1994 without first resolving the issue of class certification as it was required to do under Fed. R. Civ. P. 23(c)(1) ("As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.").[10]

[Footnote Continued From Previous Page]

be denied all relief, or (2) the Department will not obtain a stay and the case will likely become moot before review by this Court.

10 See, e.g., Swisher v. Brady, 438 U.S. 204, 214 n.11 (1978) (admonishing district courts "to heed strictly" the requirements of Fed. R. Civ. P. 23(c)(1) "where mootness problems are likely to arise"); Navarro-Ayala v. Hernandez-Colon, 951 F.2d 1325, 1334

[Footnote Continued On Next Page]

In seeking rehearing of the D.C. Circuit's February 3, 1995 decision, the Department then argued that the case had become moot, in part because no class had been certified. At the Department's request, the court of appeals remanded the record to the district court for consideration of the mootness issue. On remand, the respondents again sought class certification, and again the Department persuaded the district court not to rule on the issue. On appeal from the district court's ruling that this case was moot, respondents again asked the court of appeals to certify a class, but the Department argued that the court must remand for such a determination. On February 2, 1996 the court of appeals reversed the district court's mootness determination, finding that the Department's mootness argument was wholly lacking in merit. (Pet. at 39a-49a.)[11] Following the Department's suggestion, however, the court did not itself certify a class and remanded.

Accordingly, had the Department not persuaded the district court to ignore the class certification issue, and then throughout these proceedings resisted any effort to have a court decide the issue, the court of appeals would have finally disposed of this case in early 1995, and the Department would have filed its petition more than one year ago. Under those circumstances, the respondents and class members would not now have their backs against the wall of the July 1997 reversion to Chinese Communist rule while awaiting judicial resolution of their claims, and the Department would not face the tactical difficulties presented by parallel litigation (since there would have been no need for 24 members of the putative class in this case to file the Lisa Le case).

[Footnote Continued From Previous Page]

(1st Cir. 1991) (characterizing failure to determine certification issue as soon as practicable after action commenced as "an egregious omission"); Larionoff v. United States, 533 F.2d 1167, 1183 (D.C. Cir. 1976), aff'd, 431 U.S. 864 (1977).

11 Implicitly acknowledging that its mootness argument had no merit, the Department does not seek review of that ruling. (Pet. at 10 n.7.)

Ironically, although the Department resisted any decision on class certification, it did not oppose class certification or state that certification was inappropriate.[12] Indeed, in Lisa Le, the Department scolded the putative class members in this case for starting a separate action, and for all intents and purposes conceded that class certification is appropriate in this case, stating that "[i]t is untenable to permit the putative class members [in LAVAS] one-by-one to seek injunctive relief in separate cases." (Dept's Emergency Motion for a Stay Pending Appeal, Chau, No. 95-5205 (D.C. Cir., June 29, 1995).) It seems that the Department does not really believe that class certification is unwarranted. Its litigation tactics, however, threaten to deny respondents (and the putative class members) any effective relief.

Thus, if this Court concludes that review in this case is warranted, it should grant the Department's petition without delay. On the other hand, if this Court concludes that review in this case is not warranted, there is no reason to hold the Department's petition pending the disposition of the in banc proceedings in the court of appeals.

---

12 The reason that the Department did not oppose class certification is that it could not. This action is a "paradigm" Rule 23(b)(2) class action both because the relief sought is solely injunctive and declaratory in nature and because the claims at issue are predicated on a discriminatory agency policy that is generally applicable to all members of the plaintiff class. Comer v. Cisneros, 37 F.3d 775, 796-97 (2d Cir. 1994).

REASONS FOR DENYING THE WRIT

I. THE DEPARTMENT FAILED TO PRESERVE ITS CONSULAR VENUE ARGUMENT.

The principal basis upon which the Department seeks a writ of certiorari is that, in the Department's view, the court of appeals' "construction of Section 202(a)(1) of the INA is erroneous" because that section only "prohibits consular officers from granting or denying visas on the basis of nationality" and "does not . . . speak to the State Department's authority to control where aliens may apply for visas." (Pet. at 16 (emphasis in original).)

While the Department now believes that interpretation to be self-evident, the Department did not raise in the district court the issue whether Section 202(a)(1) applies to "consular venue" decisions. Nor did it raise the issue in its merits brief before the court of appeals or at oral argument. The first time the Department even mentioned this issue was in its petition for rehearing and suggestion for rehearing in banc. It is, however, a long standing principle in the courts of appeals that a party may not raise issues for the first time on petitions for rehearing or rehearing in banc.[13] The principle is no less true in this Court that a "question presented in [a] petition [for certiorari] but not raised in [the] court of appeals is not properly before" it. Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981). Inasmuch as the critical legal argument upon which the Department seeks certiorari has not been raised or passed upon by the court of

---

13 See, e.g., Dilley v. Alexander, 603 F.2d 914, 916 (D.C. Cir. 1979); Bullock v. Mumford, 509 F.2d 384, 388 (D.C. Cir. 1974); Peter v. Hess Oil Virgin Islands Corp., 910 F.2d 1179, 1181 (3d Cir. 1990) (citing numerous cases), cert. denied, 498 U.S. 1067 (1991); Anderson v. Beatrice Foods Co., 900 F.2d 388, 397 (1st Cir. 1990), cert. denied, 498 U.S. 891 (1990); cf. Herbert v. National Academy of Sciences, 974 F.2d 192, 196 (D.C. Cir. 1992) (court of appeals "generally refuses to entertain arguments raised for the first time in an appellant's reply brief").

appeals, it would not be appropriate for this Court to grant certiorari to consider that argument.

II. THERE WAS NO ERROR BY THE COURT BELOW.

A. The D.C. Circuit Correctly Applied Section 202(a)(1) Of The INA.

1. In addition to being late, the Department's argument that Section 202(a)(1) of the INA only "prohibits consular officers from granting or denying visas on the basis of nationality" is wrong. The Department's interpretation of 8 U.S.C. § 1152(a) contravenes the plain language of the statute and defies logic.[14] That section by its terms provides that "[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality." 8 U.S.C. § 1152(a) (emphasis added). The use of the word "priority" demonstrates that section 1152(a) is not limited to the substantive decision of the consular officer whether or not to grant a visa, but encompasses also the timing of such issuance -- a matter that is inextricably related to place of processing.

The Department also ignores the fact that 8 U.S.C. § 1152(a) places nationality on the same footing as race to prohibit discrimination with regard to either in the issuance of an immigrant visa. Under the Department's narrow interpretation, the Secretary -- or an individual consular officer for that matter -- could impose onerous procedural requirements on the issuance of

---

14 The Department's interpretation of this provision -- asserted for the first time in its petition for rehearing -- is entitled to no deference. See, e.g., Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 156 (1991); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); Bresgal v. Brock, 843 F.2d 1163, 1168 (9th Cir. 1987) (where agency construes statute for first time at "outset" of litigation, its "construction is entitled to no more deference than is the interpretation of any party to the suit"); Alaniz v. Office of Personnel Management, 728 F.2d 1460, 1465 (Fed. Cir. 1984) ("It is clear that no deference is due to an agency 'interpretation' fashioned for the purposes of litigation.").

an immigrant visa, which would make the procurement of such visas more difficult for members of a particular race or nationality. For instance, a consular officer could require all aliens of a particular race or nationality to meet special documentary requirements based on his or her belief that aliens of that race or nationality are more likely to fall within one of the specified grounds of exclusion (e.g., likely to become a public charge). Alternatively, the Secretary would be free simply to suspend indefinitely all processing of immigrant visas for a group of aliens purely on the basis of race or nationality, since that suspension would not involve individual consular officers' decisions whether to grant or deny a particular application. It is inconceivable that this was the intent of Congress when it enacted 8 U.S.C. § 1152(a).

By focusing on the word "issuance" in isolation, the Department also overlooks the fact that 8 U.S.C. § 1152(a) is an anti-discrimination provision that forbids discrimination in the issuance of a visa. It is well established that anti-discrimination provisions are "humanitarian" in nature and "should be liberally construed to effectuate the congressional purpose of ending discrimination." Rabzak v. Berks County, 815 F.2d 17,20 (3d Cir. 1987).[15] Yet, no broad reading of Section 1152(a) is needed to conclude that when a person is forced to leave his country of residence to have his visa processed because of his race or nationality, that person has been discriminated against in the "issuance of an immigrant visa." Thus, in the context of this anti-discrimination provision, the place of processing an immigrant visa must be regarded as part and parcel of its issuance.

---

15 Section 1152(a) was passed as part of the Immigration and Nationality Act -- Amendments of 1965, Pub L. 89-236. A major purpose of the Act was to eliminate the national origins quota system, which had restricted the immigration of aliens of Asian ancestry, and to ensure that "henceforth there will be no differentiation in the treatment of the Asian under the Immigration and Nationality Act." S. Rep. No. 748, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 3328, 3333.

When Congress prohibited all discrimination in the issuance of an immigrant visa, it necessarily prohibited the Department from imposing onerous procedural obstacles on the issuance of an immigrant visa, which make the procurement of such visas more difficult for members of one particular race or nationality than for members of another race or nationality. Congress recognized the absence of any meaningful distinction between processing and issuance when it included Section 222(a) of the INA (8 U.S.C. § 1202(a)) -- relating to the place of processing -- under a chapter entitled "Issuance of Entry Documents" (emphasis added). See also H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1708 ("Sections 221, 222, and 223 provide for the issuance of entry documents . . . [including] both immigrant and nonimmigrant visas.").

Similarly, Section 221 (8 U.S.C. § 1201), entitled "Issuance of visas," confirms that the Act makes no such artificial distinction between "issuance" and "processing." Subsection 1201(g) provides that a visa shall not be "issued" to an alien if the "application fails to comply with the provision of this chapter [the INA], or the regulations promulgated thereunder." The Act thus recognizes that the "issuance" of visas cannot be separated from the procedures under which visa applications are processed.[16]

2. The Department argues (at 18) that this Court should grant review because the D.C. Circuit erred in finding that "the policy at issue here discriminates on the basis of nationality." The Department does not explain why this Court should depart from its normal practice and grant review solely to correct what the Department asserts is an erroneous factual finding. At any rate, the Department's argument that its policy does not discriminate on

---

[16] The Department's citation to a statement in the federal register to support its view that Section 202(a)(1) does not limit the Department's discretion to discriminate on the basis of race or nationality in consular venue decisions is astonishing. The Department drafted the self-serving language it cites when it amended 22 C.F.R. § 42.61(a) in specific response to this lawsuit -- nearly thirty years after Congress enacted Section 202(a)(1).

the basis of nationality is clearly wrong. Unlike "[n]ationals of other countries not subject to the CPA," Vietnamese immigrants in Hong Kong must establish the legality of their status, i.e., that they are not screened-out, in order to be processed at the consular office. (Pet. at 8a-9a.) Thus, as the D.C. Circuit correctly found, the Department's policy draws an "an explicit distinction between Vietnamese nationals and nationals of other countries when refusing to process the visas of the screened out Vietnamese immigrants." (Pet. at 9a.) By drawing such an explicit distinction, the Department's policy unquestionably "discriminate[s] against Vietnamese on the basis of their nationality." (Pet. at 11a); see also Chau, 891 F. Supp. at 655 ("What the declarations appear to prove is that the Department of State maintains a policy that discriminates against asylum-seekers from not one, but two or three specific countries").

B. The D.C. Circuit Was Correct In Holding That Decisions Of The State Department That Violate The INA Are Subject To Judicial Review.

1. The Department's only other argument in support of its petition is that the D.C. Circuit erred in finding that its discriminatory policy was subject to judicial review. This argument warrants little comment. The Department rests its argument principally on the doctrine of consular non-reviewability. (Pet. at 21.) As the courts of appeals have previously made clear, the doctrine of consular nonreviewability "has no application" where, as here, the challenge does not concern "a decision by a consular officer on a particular visa application," but the interpretation and application of a regulation that "violates the pattern set forth in [the INA]." International Union of Bricklayers & Allied Craftsmen v. Meese, 761 F.2d 798, 801 (D.C. Cir. 1985); accord Mulligan v. Schultz, 848 F.2d 655, 657 (5th Cir. 1988). Inasmuch as this case does not involve a challenge to any decision of a consular officer "on a particular visa decision," all of the cases cited by the Department are inapposite and the Department's fear that this case will open up "a broad new avenue of judicial review" is unfounded.

2. The Department's assertion that the respondents do not have a right under the APA to review agency action in violation of the INA is contrary to established judicial precedent. Under 5 U.S.C. § 702 of the APA, a party is entitled to seek review unless a statute specifically "preclude[s] judicial review." Abourezk v. Reagan, 785 F.2d 1043, 1051 (D.C. Cir. 1986), aff'd, 484 U.S. 1 (1987) (quoting 5 U.S.C. § 701). As the D.C. Circuit noted in Abourezk, 785 F.2d at 1051, the INA "far from precluding review, affirmatively provides for it" in 8 U.S.C. § 1328, which provides that "the district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under the provisions of this title."[17] The ruling in Abourezk is consistent with the pronouncement of this Court "that in the absence of clear and convincing evidence that Congress" intended otherwise, "the broadly remedial provisions of the [APA]" are available "to review administrative decisions under the 1952 [Immigration and Nationality] Act." Rusk v. Cort, 369 U.S. 367, 379-80 (1962); accord Jean v. Nelson, 472 U.S. 846 (1985) (holding that INS officials are "bound by the provisions of the [INA] and of the regulations" and remanding to district court to determine whether those officials exercised their "broad discretion" to deny parole under the INA and the regulations "without regard to race or national origin"); Brownell v. Tom We Shung, 352 U.S. 180 (1956); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).[18]

---

17 The Department's citation to Ardestani v. INS, 502 U.S. 129 (1991), is inapposite because that case involves review of deportation proceedings. Section 242(b) of the INA expressly provides that the deportation procedures it "prescribe[s] shall be the sole and exclusive procedure for determining the deportability of an alien under this section."

18 "Pedreiro remains the law, although the particular mode of APA review at issue in the case -- an action for injunctive relief in federal district court -- has been eliminated by § 106 of the [INA], 'which replaced it with direct review in the courts of appeal based on the administrative record.'" INS v. Doherty, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in the judgment and dissenting in part) (quoting Agosto v. INS, 436 U.S. 748, 752-53 (1978)).

Without citing any authority, the Department argues (at 22) that its discriminatory policy of refusing to process immigrant visa applications of Vietnamese nationals is "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2). Contrary to the Department's assertion, its decision to discriminate against Vietnamese asylum-seekers on the basis of their nationality, far from being committed to agency discretion, is expressly prohibited by 8 U.S.C. § 1152(a), and is expressly subject to judicial review by 8 U.S.C. § 1328.

III. THE DECISION OF THE COURT BELOW IMPLICATES NO INTERESTS OF SIGNIFICANT NATIONAL IMPORT.

A. The D.C. Circuit's Decision Presents No Threat To The CPA.

1. The Department attempts to elevate the importance of this case by emphasizing the "express commitment of the United States and other nations to the repatriation of Vietnamese migrants found not to be genuine refugees" and the importance of that commitment to the CPA. (Pet. at 23.) While it is true that such a commitment was made in the CPA in 1989 and was recently reaffirmed by the CPA steering committee, the fact is that the processing of immigrant visa applications of Vietnamese asylum-seekers in Hong Kong has never been regarded as being inconsistent with that commitment.

For at least four years after the CPA was adopted in June 1989,[19] the Department continued its practice, begun in 1979, of routinely processing the IV applications of Vietnamese asylum-seekers who had not been screened-in. In April 1993, the Department abruptly decided to stop such processing (891 F. Supp. at 652; J.A. 0118, 0124-25), but resumed processing in

---

19 The CPA has no formal legal status, having never been submitted to the U.S. Senate for confirmation nor made the subject of an Executive order. (J.A. 0119.)

Hong Kong in February 1994, whereupon it processed at least 130 applications of screened-out Vietnamese until June 1995. (L.A. 198.) This voluntary processing did not "derail" the CPA or undermine the foreign policy of the United States.

As the Department recognized before this lawsuit began, such visa processing does not violate the CPA, because the CPA was never intended to address this subject. (J.A. 0122-23.) In a December 1990 cable to the Consulate in Hong Kong, for example, the Department explained that requiring a screened-out IV beneficiary to return to Vietnam to pursue resettlement is:

> not at all necessary to preserve the integrity of the CPA . . . Post maintains . . . that processing subject's IV case in Hong Kong would contravene the CPA because subject has been determined to be a non-refugee. That would of course be true if we were proposing to resettle her as a refugee. However, she would be coming as an immigrant and, as Post reports . . ., all major resettlement countries have made similar requests to release detainees for immigration.

(J.A. 0103-04 (emphasis added).)

The Department states (at 24) that some of our CPA partners, including Hong Kong and Great Britain, have expressed concern "that the voluntary repatriation of Vietnamese nationals not be impeded." It is not clear that this "concern" even relates to the resumption of IV processing by the U.S. consulate in Hong Kong. Even assuming it does, however, the expression of such concern is perplexing, to say the least, in view of the fact that many of our CPA partners, including Australia, New Zealand and Great Britain, are currently processing in Hong Kong the IV applications of screened-out Vietnamese asylum seekers, in accordance with their respective laws. (L.A. 154-55, 371.) Indeed, the HKG itself has granted almost 400 immigrant visas to detained Vietnamese boat people between January 1994 through March 1996, alone. (Declaration of Kathleen Fitzgerald, sworn to April 18, 1996 (attached to respondents' opposition to Department's motion to this Court for a stay pending appeal in Lisa Le) at ¶ 2 and Ex. A.)

Moreover, in accordance with Section 13(D)(2) of its own Immigration Ordinance, the HKG has always cooperated in the efforts of resettlement countries, including the United States, to process IV cases. (J.A. 0055, 0059-61, 0139.) In fact, until the court of appeals issued a stay in Lisa Le last week, the HKG was facilitating the processing of the putative class members' visa applications by assisting them in obtaining police certificates and releasing them for purposes of obtaining medical clearances and attending consular interviews. (Supplemental Declaration of Mark L. Zuckerman, sworn to March 18, 1996 (in the record below in Lisa Le) at ¶¶ 3-6.) In view of the fact that Hong Kong, Australia, Great Britain and other resettlement countries are processing in Hong Kong the immigrant visa applications of screened-out Vietnamese boat people, in accordance with their laws, the argument that it would "jeopardize" the CPA were the United States to resume such processing in accordance with its laws makes no sense.

2. With no shortage of hyperbole, the Department argues (at 23) that processing respondents' visa applications "threatens to derail the operation" of the CPA, because it will impede voluntary repatriation. The Department presents this issue as if the Hong Kong detention centers are teeming with U.S. immigrant visa beneficiaries. In fact, of the 20,000 Vietnamese boat people remaining in Hong Kong, only about 100, or one half of one percent, are the beneficiaries of current and non-current immigrant visa petitions. (L.A. 154.)[20]

---

20 In the Lisa Le case, the Department asserted that processing of IV applications in Hong Kong encourages screened-out asylum seekers to marry U.S. citizens and to file employment-based petitions. At a time before it was preparing self-serving litigation affidavits, however, the Department dismissed this concern, stating in a cable to the U.S. Consulate that "Department doubts that American citizens in significant numbers would come to Hong Kong to marry boat people and then file immigrant visa petitions for them." (J.A. 0104.) This evaluation has proven correct as there has been no discernible "correlation between the changes in U.S. policy and the number of marriages between U.S. citizens and Vietnamese asylum-seekers."

[Footnote Continued On Next Page]

The Department's argument that the decision below is likely to have "serious adverse consequences for the successful operation of the CPA" hinges on its concern (at 23-24) that these 100 visa beneficiaries (some of whom will not become current until after July 1, 1997, when Hong Kong reverts to the control of Communist China) will be "unlikely to cooperate with the voluntary repatriation program" if the U.S. Consulate is required to accept their visa applications in Hong Kong. It is, of course, irrelevant whether applicants who are granted U.S. immigrant visas "cooperate with the voluntary repatriation program" because they will be leaving Hong Kong anyway. Those who are denied visas (or whose visas do not become current before July 1, 1997) will have no less incentive than anyone else to go back to Vietnam.[21]

Nor is there any truth to the argument that IV processing in Hong Kong will reduce the rate of voluntary repatriation among the camp population as a whole. The evidence clearly establishes that there is no statistical correlation between the decision to process or not to process IV applications in Hong Kong and the rate of voluntary return. (J.A. 0141; L.A. 154-55, 370-74; Supplemental Declaration of Mark L. Zuckerman, sworn to July 3, 1995 (in the record below in Lisa Le and not included in the Department's joint appendix) at ¶ 13.) Indeed, prior to April 1993, Hong Kong had "by far the highest rate of voluntary return

---

[Footnote Continued From Previous Page]

(Third Supplemental Declaration of Mark L. Zuckerman, sworn to August 11, 1995 (in the record below in Lisa Le but not included in the Department's joint appendix) at ¶ 6.)

21 While the Department states (at 24) that those applicants denied visas can reapply, that is only correct if the refusal is not final and can be overcome by the presentation of additional evidence. 22 C.F.R. § 42.81(b). While the decision below may give the handful of people who fall into this situation an additional incentive to stay in Hong Kong, the Department cannot demonstrate that they would otherwise voluntarily repatriate or that their decision to remain in Hong Kong would have any appreciable impact on the CPA.

of Vietnamese asylum seekers in the region," even though at that time Hong Kong was the only place in which the U.S. Consulate was processing their IV applications. (J.A. 0141.)

This should not be surprising. The United States has been accepting IV beneficiaries from Hong Kong for many years. It defies common sense to suggest that the 99.5 percent of the camp population, who by now are fully aware that they do not meet U.S. immigration criteria, are influenced in their decision to remain in squalid detention centers by the 0.5 percent who do meet such criteria. (J.A. 0141-42; L.A. 344-45.) As reflected in the record, interviews with countless asylum-seekers, camp workers and UNHCR officials confirm that the asylum seekers' repatriation decision is driven by much more significant factors, such as the conditions of confinement, the perception of conditions in Vietnam, the existence (or absence) of financial inducements, and other events that may give rise to the expectation of a strategic change in resettlement policy. (J.A. 0141-42, 0213-14; L.A. 344, 371-73.)

One such event, which according to the Department's own affidavits in the Lisa Le case stopped repatriation dead in its tracks, was the introduction of a bill in Congress (L.A. 144) in May 1995 that could have resulted in the resettlement of as many as 20,000 Vietnamese boat people in the United States. (L.A. 199, 218.) In view of this legislation, the district court in an earlier opinion in the Lisa Le case found that the Department had not demonstrated that a court order granting preliminary injunctive relief would have any significant impact on voluntary repatriation. 891 F. Supp. at 657.

B. The D.C. Circuit's Decision Poses No Threat To The Integrity Of The Visa Processing Function.

The Department asserts (at 25) that the decision below "casts doubt on the authority of the State Department to establish policies that require special procedures for visa applications by nationals of certain countries." The Department, however, is only able to identify one area in which the Department alleges that it has been necessary to discriminate on the basis of nationality in the visa issuance process. In particular, the Department asserts its rule

directing visa applicants who reside or are otherwise present in countries where there is no consular office to a consular office in another country is placed in jeopardy by the decision below. (Pet. at 17-18, 25.) However, this rule, which is set forth in the Department's Foreign Affairs Manual, applies to all visa applicants in such countries regardless of their nationality. FAM § 42.61, N3.2-1 - N3.2-5. Accordingly, it is in no way affected by the decision below.

The Department also asserts (at 17, 25) that "special processing" may be required for IV beneficiaries who are nationals of countries identified with terrorism. The Department does not explain what these "special security procedures" consist of or why they are placed in jeopardy by the D.C. Circuit's ruling. Indeed, the Department does not even assert that these procedures discriminate on the basis of nationality. At any rate, even if these procedures draw distinctions based on nationality, they would not be infirm under the decision below to the extent they could be justified by a compelling national interest.[22]

The Department argues (at 24) that the decision below "throws into doubt" the ability of the United States to respond to "future migration crises." The Department fails to point to a single such crisis in which its ability to respond hinged upon the need to discriminate on the basis of nationality in the visa issuance process. Moreover, the Department's claim is incredible on its face in view of the fact that the number of U.S. immigrant visa beneficiaries will inevitably be just a tiny fraction of any mass migration crisis.

---

22 The Department argues (at 17) that the existence of these "special security procedures" at the time Section 202(a)(1) was enacted demonstrates that the section was not intended to limit the Department's ability to discriminate on the basis of race or nationality in the processing of immigrant visas. Even if these special procedures discriminated on the basis of nationality and could not survive the decision below, which the Department does not demonstrate, the Department's practice prior to the adoption of Section 202(a)(1) does not provide any basis for departing from the plain meaning of that section. Nor does the existence of a discriminatory security procedure predating a legislative provision that expressly prohibits nationality discrimination suggest what Congress might have intended when it enacted that provision.

At bottom, the Department asks this Court to grant its petition because it believes that as a matter of policy it should have the discretion to discriminate on the basis of nationality that Congress denied the Department when it enacted Section 202(a)(1). This Court, however, is not the appropriate forum in which to seek review of congressional policy choices. If the Department believes that Section 202(a)(1) constitutes an unwarranted intrusion on its discretion, the Department should seek relief from the Congress. Indeed, that is precisely what the Department is doing. As part of the immigration bill which is currently before the Senate, the Department has slipped in a provision, which states that nothing in Section 202(a)(1)

> shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

S. 1664, 104th Cong., 1st Sess. § 172 (1996). To the extent it may be desirable as a matter of policy to amend Section 202(a)(1) in the manner the Department has proposed -- and we believe that it is not -- it is the Congress, and not this Court, that should pass upon the desirability of that amendment.

CONCLUSION

The petition for certiorari should be decided in the ordinary course and should be denied.

Respectfully submitted,

Robert B. Jobe
LAW OFFICES OF ROBERT JOBE
360 Pine Street
3rd Floor
San Francisco, CA 94104
(415) 956-5513

William R. Stein
(Counsel of Record)
Daniel Wolf
M. Kathleen O'Connor
HUGHES HUBBARD & REED
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-3600

Counsel for Respondents

April 22,1996